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IN THE

Supreme Court of the United States

No. 490

AUGUSTA M. TURNER,
Petitioner,

v.

CARL A. LUER, WILLIAM J. LUER, HERMAN F. LUER,
Respondents,

ALTON BANKING AND TRUST COMPANY, a Corporation, Executor of the Last Will and Testament of AUGUST LUER, Deceased,
Intervening-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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ALTON BANKING AND TRUST COMPANY, a Corporation, Executor of the Last Will and Testament of AUGUST LUER, Deceased,

Intervening-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

Augusta M. Turner, a citizen of the United States of America, prays that a writ of certiorari issue to bring before this Court for review a judgment rendered by the United States Circuit Court of Appeals for the Seventh Circuit affirming a judgment of the District Court of the United States for the Southern District of Illinois, Southern Division, dismissing the petitioner's suit.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the Seventh Circuit affirming the judgment of the District Court dismissing plaintiff's suit was entered on April 24, 1945. (R. 256)

Petition for rehearing was seasonably filed and was denied June 9, 1945 (R. 257) and time within which to file this petition was extended to October 8, 1945, by order of Mr. Justice Black. (R. 258)

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended. (Title 28, U. S. C. A. 347)

DECISION OF THE CIRCUIT COURT OF APPEALS.

The decision of the United States Circuit Court of Appeals for the Seventh Circuit, affirming the District Court, will be found in the record on pages 251 to 256, inclusive, and is reported in 149 F. 2d 51.

The Opinion of the District Court will be found in the record on pages 229 to 233.

STATEMENT OF THE MATTER INVOLVED.

This action was commenced by suit in the District Court of the United States for Southern District of Illinois, Southern Division, to establish a trust and require the three individual respondents, as trustees, to account to petitioner for her one-fifth share therein. (R. 2, 88)

August Luer, father of the petitioner and of the three individual respondents, created a trust on February 17, 1930, for the life benefit of himself and wife, with remainders to his five children and their descendents. (R. 104) The children, all adults, consisted of the three sons (the individual respondents) and two daughters, one of whom is the petitioner. He had nine grandchildren at that time. (R. 195) At a family meeting called by August Luer, the

instrument creating the trust was read by the trustees and beneficiaries, after which it was signed in duplicate by August Luer and by the three sons as trustees. (R. 102 to 106, 145, 195, 201, 208)

Certain property, corporate stocks and a promissory note were assigned and transferred to the trustees by the settlor, as a part of the trust corpus. (R. 157, 158, 161 to 177)

In December, 1932, or January, 1933, August Luer destroyed his signed copy of the trust instrument, procured from one of the trustees the other signed copy of the trust instrument, which he destroyed.[1] In January, 1933, the corporate stocks and promissory note were reconveyed by the trustees to August Luer. (R. 178)

So far as it appears in evidence August Luer left no records to show the terms of the trust or to show whether any of the beneficiaries consented to the destruction of the trust instrument or to a revocation.

August Luer died September 22, 1942, his wife having predeceased him, and one daughter, Helen Luer Petersen, died November 24, 1941, leaving a surviving daughter. (R. 98, 212)

The attorney who drew the trust instrument is dead. (R. 121)

The respondents' pleadings contain no allegation as to why they permitted the settlor, August Luer, to destroy his

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[1] William J. Luer, a trustee and respondent, testified that in connection with the renewal of a promissory note held by a bank, the effect of the August Luer trust had been discussed and that August Luer came to his office in December, 1932.

(R. 185)—Direct examination of William J. Luer:

"Q. Did your father say anything to you about a trust instrument on that particular occasion?

A. He said he was going to destroy it on account of that particular note—it was a note we boys were supposed to sign."

He testified that August Luer destroyed the trust instrument and also the trustees' copy which he gave to August Luer at his request. (R. 186, 187)

copy of the trust instrument, nor the reason they participated with him in the destruction of their copy other than in connection with the bank note stated in foregoing footnote. Likewise, the evidence adduced at the hearing in the District Court contains nothing tending to reveal why both of the signed trust instruments were destroyed by the settlor, when, if they had contained a reservation of revocation, the settlor's written revocation would have been sufficient, and all the documents could have been preserved, including the trust instruments.

At the hearing in District Court, the petitioner, her husband, and the secretary of the attorney who drew the trust instrument, all testified that the trust contained a clause stating that the trust was *irrevocable.* (R. 105, 124, 133)

The petitioner introduced as an exhibit a trust instrument containing an irrevocable provision in the drafting of which the attorney for August Luer had used as a model for the irrevocable provision his office file copy of the Luer trust prior to its destruction. (R. 143, 155)

The three trustees (respondents) testified that they *"did not remember", "could not recall"*, and *"did not think"* the Luer trust instrument contained a clause stating the trust was irrevocable. (R. 194, 197, 203, 205, 208, 209)

There is no evidence that the trust contained any declaration that it was revocable.

The District Court and Court of Appeals held that the *petitioner* failed to establish that the trust was irrevocable. (R. 253)

The Court of Appeals disregarded the established rule of Illinois law that a voluntary trust is presumed to be irrevocable. The Court of Appeals held:

> (R. 253) "Here was a somewhat difficult burden in view of the destruction of all copies of the trust instrument."

The Circuit Court disregarded the Illinois rule of presumption against the spoliators and overlooked the fact

that it was the settlor and a trustee-respondent who destroyed the trust instrument and placed the burden, if any there be, on the petitioner.

The Court of Appeals stated further:

> (R. 253) "It is rather hard to believe that one so reliable and upstanding as Mr. Luer would destroy a trust agreement by tearing it up, were it irrevocable."

Now there is nothing whatsoever in this record as to how upstanding or reliable was Mr. Luer (the Trustor). We may note further that if an upright and upstanding man had revoked and destroyed his solemnly executed trust instrument, he would be expected to leave available some plain memorial of the justification for his action.

This holding on the part of the Court of Appeals is given by the Court as adding to the burden already assigned (by the Court) to the petitioner of proving that the trust instrument was irrevocable in terms.

To what extent her burden was thereby increased, or what weight was given by the Court to this (assumed) character of the Trustor, does not appear, and is problematical. Any weight given to it was plainly erroneous.

The Court should have followed the recognized principle of the law of Illinois as to a despoiler of evidence and held that, it must be presumed that the trust was irrevocable, otherwise it would have been retained as a memorial and revoked by the settlor's written designation.

The Circuit Court affirmed the District Court's ruling that the petitioner had

> (R. 231) "failed to establish by the evidence in this case that such action on the part of August Luer was without authority and void, * * *"

The Circuit Court affirmed the District Court invoking against the petitioner the rule of "estoppel" to assert a valid trust. (R. 233) We assume the Court relied upon Finding of Fact numbered VI, VII and VIII (R. 231, 232)

because the petitioner had attended two corporate meetings with her father in which he appeared as a stockholder, and because she had not protested the sale by the executors of her father's estate and the purchase by one of the respondents of certain personal property. In their answer to petitioner's suit, respondents admit this is the same property which was at one time held by them as part of the trust property. (R. 11, 66)

These findings of fact do not support the claim and finding of estoppel.

With respect to the finding in VI that petitioner had knowledge of the destruction of the trust agreement during the period from and after its destruction up to a short time prior to this suit, that finding is without any supporting evidence.

With respect to the finding that, during said period, petitioner knew of the return of the trust assets to the Trustor, that finding is without any supporting evidence.

With respect to the other findings in VI (R. 231) the Luer Building Company had outstanding at least 495 shares of stock, prior to the delivery of the trust assets to the trustees. Only 95 of said shares were conveyed in trust to the trustees. (R. 230)

On May 17, 1931, August Luer held the title to 100 shares. (R. 24)

There is absolutely nothing in the minutes of the proceedings of the Luer Building Company justifying the finding in VI that petitioner, by any waiver agreements, or by her attendance at any stockholders' meetings, acquired notice or knowledge of the revocation of the trust instrument or of the resumption of control or ownership of the stock of the Luer Building Co. by the Trustor; and such finding by the District Court and its affirmance by the Circuit Court of Appeals are unjustified by this or any other evidence in the record.

Finally, in support of lame and unsupported conclusions, the Circuit Court of Appeals relies on a statement attrib-

uted to petitioner's husband (searching for some evidence) that "the trust has been cancelled out a long time ago".

The witness actually testified (R. 215) that he did not mention the August Luer trust to petitioner's husband; further, that he did not know what petitioner's husband was talking about.

The petitioner's husband testified (R. 219) that he did not mention a trust in his conversation.

There is no showing or explanation as to when petitioner's husband had ascertained that fact. Non constat, but that it was a recent discovery by him of long past facts. To fasten this statement even if made as an estoppel upon his wife, this petitioner, is utterly wrong and unjustified.

The intervening respondents, Alton Banking and Trust Company, as Executors of the will of August Luer, objected to any testimony by petitioner concerning contracts, conversations or dealings with August Luer, now deceased. (R. 98)

August Luer and the three trustees were residents of Alton, Illinois, the trust instrument was executed there, and the situs of the trust property also was Illinois. (R. 88)

The petitioner is a citizen of the United States of America and a resident and citizen of the State of Missouri. (R. 88)

The Circuit Court of Appeals states the issues:

> (R. 252) "Plaintiff's suit is predicated on the theory that the 1930 trust created by her father was irrevocable. If irrevocable, plaintiff argues, it still is in force, and the corpus should be divided as provided in the trust, and not included in August Luer's estate."

The Opinion of the Circuit Court contains neither citations, references to appellant's authorities nor legal reasoning or explanation for disregarding Illinois law or the genesis of the announced unwritten "general law". (R. 229) The Opinion of the District Court likewise is deficient. (R. 251)

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QUESTIONS.

1) **Should the Oft-Challenged and Overruled Doctrine of Swift v. Tyson [2] Be Re-established?**

2) **Are the Federal Courts Authorized to Supply Their Own Unwritten "General Law" of Trust and Disregard the Applicable Local Law?**

3) **Are the Federal Courts Free to Disregard the Rule of the Illinois Common Law in a Matter Concerning the Presumption That a Voluntary Trust Is Irrevocable Unless the Power to Revoke Is Specifically Retained?**

The Circuit Court in the instant case having held the burden was upon the petitioner to prove the trust irrevocable has thus held the trust will not be presumed to be irrevocable—this is *contra* to the Illinois law of trusts.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

I.

The decision of the Circuit Court herein establishes an unwritten "general rule" of the law of trusts *contra* to the common law and applicable local law.

II.

The decision resurrects the doctrine of *Swift* v. *Tyson* which was overruled in *Erie R. Co.* v. *Tompkins.*

III.

If allowed to stand, the decision will become the basis for grave discrimination by non-citizens against citizens

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[2] 1842—16 Pet. 1, 10 L. Ed. 865.
Overruled 1938—*Erie R. Co.* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817.

of a particular state and thus create uncertainty and render impossible equal protection of the law.

IV.

An opportunity is created to defeat the application of the Federal Gift Tax Statutes.

V.

The decision conflicts with decisions of other federal circuit courts on the same matter.

VI.

The decision of the Seventh Circuit Court herein conflicts with applicable local law.

(1) The decision does not follow the presumption that a voluntary trust is irrevocable unless by specific declaration a power to revoke is retained.

(2) The decision improperly holds petitioner estopped to show existence of a valid trust.

REASON I.

Decision Establishes an Unwritten "General Law" Contra to Local Law.

a) The common law and local law of Illinois establish a presumption that a voluntary trust is *irrevocable* unless a specific declaration makes it revocable.
Harris Trust and Savings Bank v. *Morse,* 238 Ill. 232;
Williams v. *Evans,* 154 Ill. 98;
Hubbard v. *Buddemeir,* 328 Ill. 76; 131 A. L. R. 457, etc.

b) This decision herein establishes a *contra* doctrine, namely, that a trust is *revocable* unless it is definitely established by its terms to be irrevocable.

The far-reaching application of this strange doctrine is apparent since herein the petitioner seeks to establish against the trustees a valid trust, when all copies of the instrument have been destroyed by the settlor with the co-operation of the trustees and the Circuit Court by its decision holds the local law can be disregarded and a "general law" can be followed.

REASONS II, III.

The Decision Resurrects the Repudiation Doctrine of Swift v. Tyson.

It Will Establish Again a Basis for Discrimination by Non-Citizens Against Citizens, Create Uncertainty and Render Impossible Equal Protection of the Law.

By its decision in *Erie R. Co.* v. *Tompkins, supra,* this Court overruled the doctrine of *Swift* v. *Tyson, supra,* stating at page 823:

> "Swift *v.* Tyson introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law."

This doctrine of *Swift* v. *Tyson, supra,* was overruled only after prominent advocates of the law by diligent research had established its lack of constitutionality and its serious discrimination had been realized.[3]

This decision until overruled will remain the rule in the Seventh Circuit and establishes a presumption that a voluntary trust is revocable and that the burden is upon the

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[3] Frankfurter, Distribution of Judicial Power between Federal and State Courts (1928), 13 Corn. L. Q. 499-524, 530; *Erie R. Co.* v. *Tompkins*—Footnotes 58 S. Ct., pages 818 to 822 incl.

cestui que trust to prove that a voluntary trust is not revocable but by its terms was made irrevocable, thus establishing a "general rule" of law *contra* to the applicable state law and denies to the non-citizen suing in federal courts equal protection of the law with citizens.

REASON IV.

Decision Creates Opportunity to Defeat Federal Revenues.

In its present form, the decision establishes that any trust can be revoked by destruction of the instrument itself, and that a trust will be presumed to be revocable unless it can be proven that it was irrevocable by its terms.

Thus, the stamp of legality is placed upon an act by the settlor who, in co-operation with trustees, destroys a trust instrument, thereby permitting its termination and return of the property where, otherwise, the property would be the basis of a gift taxable as such by the Federal Gift Tax Statutes.

REASON V.

The Decision Conflicts With Decisions of Other Federal Circuit Courts.

This decision of the Seventh Circuit Court herein conflicts with the decision in *Hughes* v. *Commissioner of Internal revenue* (1939) (C. C. A. 9th), 104 F. 2d 144, wherein the applicable local law of trusts is followed in holding that a trust is presumed irrevocable unless specifically declared to be revocable.

The Illinois law (references under Reason I hereinabove) is identical with the Massachusetts law (131 A. L. R. 457, 458, 469) held applicable in the *Hughes* case, *supra.*

It is the duty of Circuit Court of Appeals to apply state laws as found in state decisions, irrespective of what such court may regard as its merits. *Kraus* v. *Greenborg* (1943) (C. C. A. 3rd), 137 F. 2d 569.

The law to be applied in any case is the law of the state. *Alameda County* v. *U. S.* (1941) (C. C. A. 9th), 124 F. 2d 611.

The petitioner urges that the decision of the Seventh Circuit Court of Appeals in the instant case is:

1—In conflict with a decision of another Circuit Court on the same matter, and on which the "state law" in the applicable states of the two Circuit Courts are identical; and is

2—In conflict with applicable local decisions.

REASON VI.

The Decision of the Seventh Circuit Court Herein Conflicts With Applicable Local Law.

The Seventh Circuit Court has failed to apply the local law of Illinois and by its decision has established its own "General Law" of trusts.

The Illinois law holds that:

1—A voluntary trust is presumed to be irrevocable unless a specific declaration makes it revocable.
Harris Trust and Savings Bank v. *Morse, supra;*
Williams v. *Evans, supra;*
Hubbard v. *Buddemeir, supra;* 131 A. L. R. 457, etc.

2—A voluntary trust may be revoked by consent if the the settlor and all the beneficiaries are *sui juris* and consent, but where there are holders of contingent or vested interests who have not consented, the trust cannot be terminated.
Botzum v. *Havana National Bank* (1937), 367 Ill. 539, 12 N. E. 2d, 203, 131 A. L. R. 469.

3—The burden was upon the trustees-respondents to show that August Luer had reserved the power to revoke the trust since the voluntary creation of the trust was admitted.
Dobroth v. *Jensen,* 348 Ill. 167.

4—August Luer could not revoke the trust by mere destruction of the trust instrument.
William v. ***Evans,*** 154 Ill. 98.

5—The burden was upon the trustee-respondents to overcome the presumption arising from the doctrine of despoiler of the evidence.
Hudson v. *Hudson,* 287 Ill. 286;
Nofftz v. *Nofftz,* 290 Ill. 36.

6—A fiduciary claiming estoppel against a *cestui que* trust must show that he has exercised the utmost good faith in dealing with the *cestui que* trust.
Auer v. *Wm. Myer Co.,* 322 Ill. A. 344; 54 N. E. 2d 394.

To summarize:

The presumption of Illinois law applicable to the instant case is that a voluntary trust is presumed to be irrevocable unless by its specific terms it is made revocable.

The rule of local law was ignored by both the District Court and the Circuit Court of Appeals.

Furthermore, the evidence of record established the trust to be irrevocable by its terms.

There was no evidence to show that the trust contained any reserved power of revocation.

CONCLUSION.

The Supreme Court in its decision in *Erie R. Co.* v. *Tompkins* intended the doctrine of that case should be applied by the Federal courts to the issues of a case such as herein presented.

That the Seventh Circuit in the instant case has disregarded the doctrine of *Erie R. Co.* v. *Tompkins* and the laws of Illinois and substituted its own independent judgment and applied an unwritten general law in the manner of the doctrine of *Swift* v. *Tyson* is respectfully submitted.

Thus, we have an unconstitutional assumption of powers by the federal courts of the United States which this Honorable Court should not hesitate to correct.

WHEREFORE, that the Writ of Certiorari should be granted is

Respectfully submitted,

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